

<b><i>NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 30-108-01 FEBURARY 28, 1996</i></b>	
<b><i>Administration and Operations Public Support</i></b>	
<b><i>PUBLIC SUPPORT FOR NMFS OPERATIONS</i></b>	
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UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
Silver Spring, Maryland 20910

FEB 28 1996

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MEMORANDUM FOR: Regional, Science and Office Directors  
FROM: *Gary Matlock*  
Gary C. Matlock  
Program Management Officer  
SUBJECT: Public Support for NMFS Operations

Several days ago I provided you a copy of a draft memo from Barbara Fredericks to Rollie Schmitten for review and comment. It was my understanding that we were given the opportunity to affect the content of the memo before it was finalized. Apparently, I misunderstood because the final, signed original arrived in my in-box today via the Northwest Region (Attached).

However, it appears that the final version is substantially the same as the draft which seems to have addressed the bulk of our previous concerns. Please let me know if there are any significant matters that need further attention.

Thanks for all of your help in resolving this very important issue.

Attachment



FEB 15 1996



UNITED STATES DEPARTMENT OF COMMERCE  
Office of the General Counsel  
Washington, D.C. 20230

MEMORANDUM FOR: Rolland A. Schmitten  
Assistant Administrator, National  
Marine Fisheries Service  
National Oceanic and Atmospheric  
Administration

FROM: Barbara S. Fredericks *BSF*  
Assistant General Counsel  
for Administration

SUBJECT: Public Support for NMFS Operations

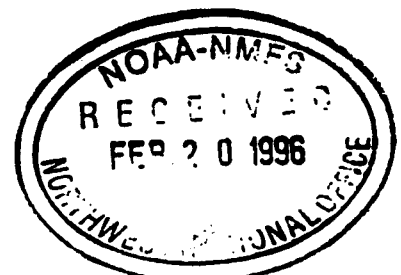
This office has been asked to provide guidance on whether and under what circumstances the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) can accept donations and support from persons or groups in the commercial fishing industry<sup>1</sup> to conduct research operations.<sup>2</sup> In the course of discussions on that issue, a number of other NMFS programs for which there is public support were brought to our attention. This memorandum addresses whether and when such support may be accepted.

We start from the premise that cooperation between the Government and the public is desirable, particularly in the area of scientific research. But we recognize that when the Government accepts funds, goods, or services from a source which can be significantly influenced by Government action, it is important that the public interest and the public perception of the integrity of Government operations be preserved. Thus, NMFS and members of the fishing industry must cooperate in a manner which ensures no preferential treatment or loss of objectivity.

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<sup>1</sup>/ Although the primary focus of this memorandum is on members of the commercial fishing industry, the guidance is equally applicable to any persons who have interests which can be substantially affected by NMFS actions, such as recreational fishermen.

<sup>2</sup>/ It is our understanding, based on advice from NOAA's Office of General Counsel, that NOAA does not have the authority under the Magnuson Act to regulate scientific research conducted from a scientific research vessel. This memorandum addresses limits on acceptance of donations, not the regulation of private scientific vessels.



## TYPES OF PUBLIC SUPPORT

As described to us, there are generally four types of support NMFS receives, or proposes receiving, from members of the public to assist in its activities:

1. data -- conservation and industry groups may conduct their own research and provide the resulting studies to NOAA for consideration in making policy or regulatory decisions; some studies may be solicited by NOAA; in some cases NMFS may provide input into how the studies are conducted; NMFS may solicit and accept data used to track marine resources;
2. specimens -- fishermen sometimes provide fish and other marine catch to NMFS for purposes of research and data collection; sometimes the specimens are excess; at other times they are part of the commercial catch of the fishermen;
3. access to platforms -- NMFS officials are sometimes provided with access to platforms on commercial fishing vessels to conduct research or observe fishing operations or marine life; this may include meals as well as berths for overnight fishing trips; some platform access is required by regulation; at other times it is voluntary; and
4. research support -- industry groups and fishermen have offered support, including funds, use of a vessel, and similar support, to assist NMFS in conducting research to ensure a more accurate basis on which to make policy or regulatory decisions affecting the industry.

Each of these types of support is analyzed below.

Support may be in the form of funds, tangible items, or services. There are different authorities for accepting such support:

- o gifts,
- o joint projects,
- o user fees, and
- o barter-type arrangements.

This memorandum focuses primarily on gifts, but other arrangements, such as joint projects, are usually preferable as they are less likely to create an appearance of impropriety. All options should be considered if appropriated funds are not available or to supplement appropriations to NMFS to conduct necessary research activities or other programs.

## LEGAL AUTHORITY TO ACCEPT PUBLIC SUPPORT

Generally, Government activities must be funded through appropriations. A donation which is a supplementation of appropriations would be barred unless it is authorized to be accepted under specific statutory authority.<sup>3</sup> One such specific authority available to the Department of Commerce is its statutory authority to accept donations of gifts or bequests to aid or facilitate its work. 15 U.S.C. § 1522. Specific criteria for accepting gifts are set forth in Department Administrative Order (DAO) 203-9. This Order provides that a gift may be accepted if it will further a program of the agency and if acceptance will not create an appearance of loss of impartiality or objectivity or otherwise create an appearance of impropriety. DAO 203-9, § 6.

Neither the statute nor the DAO defines the term "gift." For purposes of this analysis, a gift includes funds, tangible items, and support services provided without remuneration which are of significant commercial value.

An alternative basis for acceptance of public support is the Department's authority to engage in joint projects with non-profit organizations, research organizations, or public organizations or agencies on matters of mutual interest with the Department. 15 U.S.C. § 1525, ¶ 2. Under this authority, costs are equitably apportioned between the Department and the joint project partner. The equitable contribution from the joint project partner is not a gift. Funds received from proper partners under this joint project authority may be retained under 15 U.S.C. § 1526 rather than deposited into miscellaneous receipts. Joint projects are discussed further below.

Another alternative basis for acceptance of public support is payment received by NMFS pursuant to an applicable user fee statute, such as the Department's authority to undertake special studies upon the request of any person or organization. 15 U.S.C. § 1525, ¶ 1. There is also Government-wide authority to charge a fee for any special benefit to a recipient above and beyond those accruing to the public at large. 31 U.S.C. § 9701. Where an outside party requests and provides assistance for a special study or compilation from the Department, such assistance is in the nature of a user fee, and is not a gift. User fees under either authority must be set at levels to recover the "full cost" of rendering the service. As with joint projects, funds

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<sup>3</sup>/ Funds received from donations without specific statutory authority to supplement, or augment, an agency's appropriations must be deposited to miscellaneous receipts of the Treasury. 31 U.S.C. § 3302(b).

received as user fees under the Department's statutory authority may be retained under 15 U.S.C. § 1526. However, the agency may not retain user fees it receives under circumstances that do not qualify under the Department's special studies authority. NMFS must deposit such non-special studies user fees in the Treasury as miscellaneous receipts.<sup>4</sup> User fees, like joint projects, are discussed below following discussion of the rules regarding gifts. NMFS should carefully consider whether the type of research being conducted is a special study for which user fees may be charged.

#### **GUIDELINES FOR ACCEPTING PUBLIC SUPPORT -- GIFTS AND DONATIONS**

Because gifts may not be accepted if they will create an appearance of impropriety, this office has advised in the past that, as a general rule, gifts should not be accepted from members of a regulated industry. Thus, NOAA generally would not be permitted to accept donations from members of the fishing industry. The purpose of this memorandum is to reconsider this interpretation of the regulation in light of the mutuality of the needs of NMFS, the fishing industry, conservationists, and the general public in accurate and up-to-date data for use in administering NMFS programs; increasing international competitive pressure and environmental and conservational limitations on the fishing industry; and the availability of safeguards to prevent undue influence on NOAA officials.<sup>5</sup> In these circumstances, we have determined that acceptance of donations from members of the fishing industry and other interested parties would not create an appearance of impropriety provided the donations were consistent with established procedures to safeguard the integrity of the research and of NOAA programs, such as those described below.

We have analyzed below the criteria for accepting the four types of public support which NMFS officials have identified in meetings with my staff. Public support which is not a gift, e.g., services or items paid for by NMFS, contributions for a joint project, payment of a user fee or assistance which may be

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<sup>4/</sup> Two other user fee statutes applicable to NOAA are 33 U.S.C. § 883e, which permits NOAA to charge fees for providing National Ocean Service (NOS) surveys, investigations, or performing related surveying and mapping activities, and 15 U.S.C. § 1534, which permits the National Environmental Satellite, Data, and Information Service (NESDIS) to assess fees for providing environmental data.

<sup>5/</sup> We are also mindful of the expectation of increasing budget constraints and reduced Governmental resources available to NOAA to conduct important research activities.

accepted as a nonmonetary equivalent of a user fee, and barter arrangements, may be accepted by NMFS from any source and should always be considered as an alternative to, and usually preferable to, a gift. Joint projects, user fees, and barter-type arrangements are addressed below after the discussion of gifts.

Regardless of whether public support may be legally accepted under the standards set forth below, NMFS officials must consider whether it should be accepted and how it is used. For example, data from a biased source may be accepted, but should not be used if it is not scientifically sound; specimens may be solicited and accepted, but NMFS must consider whether the source is biased and could result in incorrect conclusions regarding marine resources. Furthermore, in no case should a donor be permitted to limit the use of NOAA data or research findings or their dissemination to the public.

#### Data

Generally, data are not considered a gift and may be accepted and used by NMFS without restriction. However, it is a management decision as to whether and how such data should be used, which will depend on the circumstances.

The public has a right to provide the Government with information, including research studies. The submission of data can range from relatively informal methods, such as a letter from a private citizen, to very structured submissions, such as a research study which was conducted at considerable expense by a trade association and designed to influence specific legislation or regulations. Information may be provided verbally, by telephone or in a public or a private meeting, or in written form. In all cases, data provided at the initiative of the public are not considered a gift and may be accepted and used by NMFS.

Information you provided indicates that, in response to requests from NMFS, raw data are often provided voluntarily by members of the public to help NOAA track fish and other marine resources. Persons providing such information include power companies, commercial fishermen, state agencies, trade associations (such as the East Coast Tuna Association), and charter boat operators, among others. In all such cases, even when the data have been solicited, the information is not considered a gift, but a *de minimis* form of public assistance to the Government. It is no different than the practice of the National Weather Service of asking members of the public to mail in data packages from weather balloons, and is similar to the practice of having businesses cooperate with the International Trade Administration or the United States Travel and Tourism Administration in providing information for marketing surveys. NMFS may solicit and accept this information freely.

NOAA may also solicit and accept information from members of the public by conducting public meetings. Any information provided, even if it is in the form of a formal submission, such as a research study, would not be considered a gift. NOAA may also contact specific interested parties, such as trade associations or conservation groups, to give them an opportunity to provide information on a specific matter. The request for information should be conducted on a non-preferential basis, with an opportunity for as many persons in an industry as possible to participate and for persons with diverse interests to be heard. Responses to mere requests for information are not likely to be considered gifts.

However, please note that if NMFS asks a non-Government source to conduct a study on behalf of NOAA, the resulting report may be considered a gift of services, rather than mere provision of data. Key considerations are whether the study was solicited by NMFS and was conducted under NMFS direction. For example, if NMFS officials ask a private party to conduct a research project and NMFS has substantial input into the conduct of the research to collect the data, the research would be considered a gift of services to NOAA. We would need to provide advice on a case-by-case basis, both as to whether the provision of data is a gift and whether it may be accepted. Generally, the greater the input by NOAA, the more likely solicitation of data would be considered a gift. In cases in which NOAA proposes to contact specific groups to conduct research studies, NMFS should consider using the mechanism of a joint project, which would permit NOAA to direct the project but would avoid imposition of the gift rules.

In all cases, NMFS management must decide whether and how data provided by the public are used. For example, if data are supplied by a biased source, NMFS may decide not to use the data, or to use the data only if they complement data available from an unbiased source or a source with differing interests.

### Specimens

Specimens provided by fishermen or fishing groups for research and data collection purposes are a form of data. If the specimens being provided are an incidental part of the operations of the person providing the specimens--similar to the gleanings following a harvest--they will not be considered gifts and may be solicited and accepted by NMFS, regardless of the source, because they will be considered of minimal commercial value to the donor. Thus, if a tuna fisherman inadvertently collects some squid for which he has no use, he may provide the squid to NOAA and it would not be recorded as a gift. An exception to this general rule is an incidental catch that would be considered commercially valuable to anyone who collected it.

A different conclusion would be reached if the specimens being



provided were a commercially valuable part of the regular catch, such as a significant proportion of the catch as measured by gross weight or numbers. For example, if a tuna boat provides NOAA with 5% of its tuna catch, the donated specimens must be treated as gifts unless they are paid for with funds or in a barter arrangement. Similarly, if NMFS solicits a vessel to make a special fishing trip to collect specimens, the resulting fishing activity would be considered a gift of services.

The issue then becomes whether NOAA may accept the gifts. We would need to provide advice on a case-by-case basis, but, in general, we would advise against accepting donations of significant commercial value from members of a regulated fishery. NOAA should consider alternative methods for gathering the specimens, such as a barter arrangement, a joint project, or acceptance of the in-kind payment as a user fee for a special study (if the circumstances support such an analysis). The same rules would apply to expensive inadvertently captured fish which are provided to NMFS; it would be preferable for NOAA to pay for such specimens. If that is not practical, this office should be consulted to provide advice on a case-by-case basis.

#### Access to platforms

You report that vessel operators will sometimes allow NMFS employees or contractors to accompany the vessel during its regular fishing outings, either to observe the fishing operations of the vessel or to make observations of marine resources which are unrelated to the operations of the vessel. For some operations, the vessel owners are required by law to permit observers. Mandatory provision of access to fishing platforms for observations is not a gift and is outside the scope of this memorandum. If a vessel operator voluntarily provides access to a platform for observations, a gift may be involved in the form of meals or lodging, as well as use of the platform.

Such access to commercial vessels includes three types of assistance: (1) use of platform space, (2) meals, and (3) lodging.

Temporary access to a platform provided by a vessel owner during the course of the vessel's regular commercial activities does not have significant commercial value and is not considered a gift. Therefore, NMFS may freely ask vessel owners to allow observers on their vessels as long as such access does not disrupt operations of the vessel. Donation of the vessel itself, however, would be a gift and is covered by the guidelines below concerning research support.

However, access to a platform often involves an overnight voyage; in such cases, the vessel operator may provide food and lodging. For vessels which are not in the commercial business of providing

lodging, any space provided to an observer as lodging is not of commercial value and need not be considered a gift, unless the vessel operator prefers that it be so characterized. However, meals which are provided to NMFS observers who are Government employees in the process of performing official activities would be considered donations to the Government. Similarly, meals provided to NOAA observers who are contractors would be considered donations to the Government if NOAA is obligated under the terms of the contract to provide meals to the observers. We see no legal objection to acceptance of the meals as gifts in circumstances in which NMFS determines that the observation program meets a legitimate Government objective. Because of the presumed limited value of such meals, acceptance will not create an appearance of loss of impartiality by NMFS employees in the performance of their official duties or impair the integrity of NMFS programs and operations. Similarly, meals to contractors may be accepted. We recognize that for some trips the time on board may last several weeks. Although the value of the meals provided may not be *de minimis*, in our view NOAA may accept such meals and lodging as gifts unless the totality of the circumstances indicates impropriety due to a matter of particular controversy pending before NOAA. For each trip, the donations of meals must be approved and recorded on a form CD 210, Record of Gift or Bequest.

If vessels, such as tour boats, do provide meals and lodging as part of their regular commercial activities, the provision of such lodging and meals would be considered gifts. In our view, absent unusual circumstances, such donations may be accepted as not likely to create a significant appearance of impropriety.

#### Research support

Research support may be provided in the form of: funds (which NOAA would use to conduct research); tangible items (including equipment used for research such as echo sounders); and services (including use of vessels--as opposed to mere access--and technical support and other labor). Such contributions are gifts and may be accepted only if authorized under the gift rules. This would include, for example, research which is solicited by NOAA and conducted under NOAA supervision. As noted above, a gift may not be accepted if acceptance would create an appearance of impropriety. This has led our office to advise that as a general rule NMFS should not accept donations from members of the regulated fishing industry. However, based on a review of all the circumstances and factors involved in such donations, and the mutual needs of the Government, the fishing industry, and the public for ongoing research operations in times of diminishing financial resources, we have determined that NMFS may accept donations for research support in accordance with the following guidelines because acceptance of gifts consistent with these

criteria would not create an appearance of impropriety.<sup>6</sup>

Criteria for Accepting Gifts to Support NMFS Research

It is suggested that donations from the regulated fishing industry and other interested parties to support NMFS should meet the following criteria in order to be accepted:

1. the research is important,
2. NMFS establishes priorities for its activities independently of the availability of donated resources,
3. NMFS retains control over the conduct of the research,
4. the source of the gift is publicly acknowledged,
5. donations are accepted and solicited from as broad a spectrum as possible and from interested persons with diverse interests and views, and
6. the source of the gifts does not have any controversial matter or matter of significant financial benefit pending before NOAA which is likely to be perceived as affected by the gift.

Each of these criteria is discussed below.

The research is important. The instances in which NMFS accepts gifts from members of the regulated fishing industry should be limited as much as possible. This is consistent with the concern that gifts may be perceived as an attempt to influence Government action. Thus, for example, the criteria described above permit acceptance of gifts to conduct research, but not for other purposes, such as travel gifts for NMFS personnel to attend meetings. Before accepting a donation to do research, NMFS should confirm that the research is important, not cumulative or

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<sup>6/</sup> Because provision of financial or in-kind support for NMFS research activities from members of the fishing industry is more likely to be perceived as creating an appearance of impropriety than donations of specimens or lodging for an observer, application of these criteria is appropriate when there is a gift to NMFS to conduct research. As noted above, other gifts--such as lodging on vessels--may be accepted and these standards need not be consulted. In cases in which we would have no problem providing case-by-case advice, such as donation of commercially valuable specimens, some of the listed criteria may be appropriate, but these guidelines are intended to apply principally when funds or services are being provided in connection with a research operation being conducted by NMFS.

trivial.

NMFS establishes priorities for its projects independently of the availability of donations. In authorizing acceptance of donations it is recommended that, because NMFS has limited resources, it establish priorities based on the availability of donations for a particular project rather than the importance of that activity vis-a-vis other NOAA projects. NMFS officials should make decisions regarding projects to conduct based on the public interest; agency employees must avoid any appearance that groups willing to finance NOAA operations will receive better service than those who do not have such resources.

NMFS controls the research. Regardless of the amount or type of support provided, NMFS must retain control of the conduct of the research. Thus, if a fishing association provides use of a vessel, NOAA researchers must be able to direct how and where the vessel will collect data. Note that an association may conduct its own research and provide the results to NOAA, which may then be used or not; as explained above, such data would not be considered a gift. However, if the study is intended to be perceived as a NOAA study, such support would be a gift and NOAA must control all aspects of the conduct of the research. An alternative may be a joint project in which NOAA and a private sector organization share responsibility for conducting research.

The gift is publicly disclosed. It is important that NOAA avoid any appearance that the donations are inappropriate. Therefore, there must be full disclosure of the arrangements whenever a gift is accepted for research. Ideally, this should be done before the research is conducted and in a manner that affords all interested parties an opportunity to comment. Alternatively, it should be disclosed in any report which is issued following the research, which would be available to interested members of the public, or otherwise in the course of any ensuing rulemaking. As noted above, NMFS must retain full control of the research, so that it would withstand the scrutiny of challenges as to the legitimacy of the findings.

NMFS should seek support from as broad a group as possible. If NMFS is actively seeking public support, it should be directed to groups which represent a broad spectrum of an industry and groups composed of members with diverse interests or to a diverse spectrum of individuals or groups. Thus, it is preferable that NOAA seek support from a trade organization, rather than an individual company, and it is better for NOAA to seek support from recreational and conservation groups as well as commercial fishing groups. In cases where a private entity takes the initiative to offer support, NMFS should consider whether other groups or persons would want the opportunity to participate and, if so, should contact those interested parties. The circumstances of each case will dictate whether NMFS will need to

make efforts to seek participation from a number of sources. In some cases, there will be only one interested party, so contacting others will not be necessary. In other cases, however, there may be a number of groups interested in a research project and all should be given an opportunity to contribute. NMFS should never agree, as a condition of a gift, to refuse donations from other sources.

Donations from entities with matters of controversy or significant financial benefit before NOAA should not be accepted if the donations are likely to be perceived as affecting the matter at issue. NMFS must also consider whether a donation from a particular source is likely to be perceived as an attempt to influence NOAA actions apart from the research being funded. Thus, NMFS must consider whether there are any matters pending before NOAA, including line offices of NOAA other than NMFS, in which the donor has a significant financial interest or which is of controversy and whether the donation is likely to appear to the public as affecting NOAA's objectivity or impartiality regarding that matter. The timing and the amount of the donation may be particularly important, as well as the nature of the matter pending before NOAA. Examples of matters which are likely to involve controversy or significant financial benefit include litigation, pending permit applications, civil or criminal investigations, administrative cases, contracts, trade negotiations, and similar matters. For example, a sizable donation from an oil company to fund NMFS research which is given at the same time as NOAA is surveying the effects of an oil spill caused by one of the company's tankers would present a problem even if there is no question likely to be raised about the integrity of the research. NOAA may also limit gifts from persons with a history of enforcement actions or persons who are currently under investigation; the NOAA General Counsel's Office should be consulted about donations from such individuals. Our office can provide advice on a case-by-case basis regarding application of these guidelines and what constitutes a matter of controversy or a significant financial interest.

Acceptance of donations of greater than \$25,000 must be approved by the Secretary and donations which impose obligations on the Department must be approved by the Assistant Secretary for Administration. DAO 203-9, § 4.04. We recommend that you seek specific advice from this office for any case which is likely to result in public controversy or is unusual.

#### **JOINT PROJECTS**

An alternative to accepting in-kind goods or services or funds in the form of a gift is for NMFS to enter into a joint project with a party or parties with which there is a mutual interest in supporting the NOAA program. 15 U.S.C. § 1525, § 2. Although a joint project is not necessary for members of the public to

provide data or specimens, more substantial support in conducting research surveys may often best be done through joint projects. Such arrangements may have some, if not all, of the appearance problems presented by gifts. Furthermore, there are legal restrictions on who is eligible to be a joint partner. NMFS should carefully consider in each case whether the arrangements should be a gift or a joint project.

Joint projects generally involve, to one degree or another, shared responsibilities between the Department and the joint project partner, rather than simply a mechanism for the transfer of funds from one side to the other. Thus, if the only responsibility of NMFS is to accept services from a private sector entity, the arrangement is more properly considered a gift, rather than a joint project.

Under the joint project statute, this shared effort must amount to an equitable apportionment of costs, as determined by the Department. With these restrictions in mind, and considering the need to avoid appearances of impropriety, we recommend that NMFS use the following guidelines when conducting research through joint projects:

#### Criteria for Conducting Joint Research Projects

NMFS may enter into a joint project to conduct research if it meets the following criteria:

1. the joint project partner is a non-profit entity,
2. the research to be conducted is of mutual interest to NMFS and the private joint project partner,
3. there is an equitable apportionment of costs,
4. the research is conducted in a manner which ensures its scientific integrity,
5. the public perception of the integrity of the research conducted is not likely to be impaired by the identity of the joint partner,
6. joint partners are selected in a manner which avoids any appearance of preferential treatment, and
7. the respective responsibilities of NMFS and the joint project partner are documented in an agreement signed by representatives of both parties.

These criteria are discussed below.

The joint project partner is a non-profit entity. Under

15 U.S.C. § 1525, ¶ 2, the Department may enter into joint projects only with non-profit organizations, research organizations, or public organizations or agencies. Thus, NMFS may not enter into a joint project with an individual or a for-profit company. However, NMFS may enter into a joint project with a trade association which is a non-profit entity, even if it is composed of members who are for-profit companies or commercial fishermen. For example, NMFS may conduct a research project with the Blue Water Fisherman's Association, the New Orleans Billfish Club, or the East Coast Tuna Association. Provided that the joint project is with such an organization, actual participation may be limited to an individual member or members, which may be for-profit entities. Thus, if one company in a tuna association proposes providing a vessel for a NMFS study, this support may be provided in the form of a joint project between NMFS and the association, with the company providing the association's contribution to the research project, provided that the other criteria for conducting joint projects are met.

The research is of mutual interest to NMFS and the joint project partner. One of the requirements for entering into a joint project is that the subject matter of the project be a matter of mutual interest to both parties. Thus, NMFS may enter into a joint project to conduct research only with parties that have an interest in the research. This is different than the gift rules, where any person may provide a gift.

There is an equitable apportionment of costs. Another requirement is that the costs of a joint project must be equitably apportioned between the parties. This is a concomitant of the mutual interest factor. The relative contributions need not be equal, but simply equitable, based on the partner's size and resources. The determination of what constitutes equitable apportionment is within the Department's purview.

The research must be conducted in a manner that ensures its scientific integrity. The integrity of the research is always paramount. Thus, if a member of the fishing industry is a joint project partner, the research must be conducted in a manner which ensures that the results will not be biased. For example, a joint project partner may provide a vessel to conduct research, but the research itself should be conducted by NMFS scientists or under guidelines established or approved by NOAA officials. The role of the joint project partner must be consistent with the primary objective of the project, which should be to provide valid, accurate, and up-to-date data, which may then be used by NMFS and others.

The public perception of the integrity of the research may not be compromised. There may be instances in which the identity of the joint project partner is such that the public will not have confidence in the results of any research conducted. In such a

case, NMFS should not enter into such a joint project, regardless of whether the other criteria set forth in these guidelines are met. For example, a joint project researching the effects of oil spills on an ecosystem is not likely to be accepted as valid if the joint project partner is a petroleum industry trade association which has publicly questioned whether oil spills have any significant long-term environmental impact. Such joint projects must be avoided. Similarly, the terms of a joint project may undermine public confidence in the study, such as if a non-Government joint partner retains authority to approve the final report.

NMFS should select joint partners in a manner that avoids appearances of preferential treatment. If more than one party is likely to be interested in participating in a joint project, NMFS should notify all interested parties and should establish a procedure for selecting participants which is fair and unbiased. Such procedures may be informal, such as a random selection from a pool of equally qualified interested parties. If a joint project is such that more than two joint partners are appropriate, NMFS should encourage the participation of persons with differing views and interests.

Joint projects must be documented in a written agreement. The agreement should describe the duties and obligations of all participants and should be reviewed and cleared by this office and signed by representatives of all the parties.

#### USER FEES

The Department has authority to conduct special studies at the request of a private party, for which it may charge user fees. 15 U.S.C. § 1525, ¶ 1. The private party, unlike a joint project partner, need not be a non-profit entity. NMFS may retain user fees properly charged for special studies under this authority. 15 U.S.C. § 1526.<sup>7</sup> User fees may not be charged for a study or compilation which is of general use to the public, but only if it is of particular use to the requesting party.<sup>8</sup> Furthermore, the

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<sup>7</sup>/ In contrast, user fees which are imposed on the special beneficiaries of actions of the Department which are not special studies, e.g., license fees, are imposed under a Government-wide user fee statute, 31 U.S.C. § 9701, pursuant to which any funds recovered are deposited in the Treasury rather than retained by the agency.

<sup>8</sup>/ If the study is being requested by several parties, the question of whether it is for general public use arises. If the study is requested by three or fewer persons or groups, it would be considered a special study. If it is requested by a greater number, you should contact this office for further advice.



user fees charged must be limited to the Government's costs in conducting the study. Office of Management and Budget (OMB) Circular A-130. Thus, user fees may not be set at a rate which is expected to result in excess funds beyond the costs of the study.

Because of these restrictions, user fees may be of limited usefulness as an alternative to a gift or a joint project. This office can provide more specific advice on a case-by-case basis as the need arises.

#### **BARTER-TYPE SYSTEM**

Another source for in-kind goods or services which is an alternative to gifts is for NOAA to provide a benefit in exchange for support.<sup>9</sup> This barter-type arrangement would not be covered by the gift rules, but may raise many of the same concerns regarding appearances of impropriety.

NMFS must be careful to avoid any appearance that these barter arrangements give preferential treatment to any individual or group or are otherwise contrary to the public good. Thus, NMFS may be asked to provide a party a non-monetary benefit--such as a special fishing permit or additional fishing time--in exchange for research support. If such an arrangement is authorized, NMFS should provide an equal opportunity for all interested parties to participate, either equally or proportionately, by selecting the participants in a fair and equitable manner (which may be on the basis of merit or at random) following disclosure to all interested parties of the opportunity to request consideration.

Furthermore, NMFS must be careful to avoid the appearance that the public good is compromised by these arrangements. A private party should not be able to "buy" an exception to a regulation if the regulation is in place to protect the public or safeguard marine resources and if granting the exception will create significant harm. In many instances it may be preferable to accept a gift rather than provide a benefit in exchange for research support.

The focus of this memorandum is primarily on gifts, rather than these barter-type arrangements, so the guidance we are providing regarding the latter is limited. This office is available to

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<sup>9/</sup> We do not express an opinion in this memorandum as to whether a particular barter-type arrangement is statutorily authorized. It is our understanding that NMFS has made such arrangements in the past. Our office has not been consulted on such matters and has not issued an opinion on their legal authority. The NOAA General Counsel's Office should be consulted prior to entering into any such arrangement.

provide specific advice on whether a particular barter-type arrangement is likely to create an appearance of impropriety and whether an alternative arrangement, such as a gift or joint project, is preferable. You may also seek advice from the Assistant General Counsel for Finance and Litigation as to whether a particular arrangement is the equivalent of a procurement and, therefore, must comply with Federal Acquisition Regulations or procurement rules.

#### CONCLUSION

We have not attempted to categorize each of the instances of support you have identified and are not in a position in this memorandum to provide advice on each program. These guidelines should be sufficient for your offices to determine whether there are any problems with a particular arrangement. If you have a specific question about a program involving a joint project, barter arrangement, user fee, or gift, please contact our office for further advice regarding the matter.

The NOAA General Counsel's Office may also be consulted to provide advice on how a particular donation may impact a NOAA program. Our office will consult with the NOAA General Counsel's Office as necessary when advising NOAA employees on the appropriateness of a particular arrangement.

cc: Douglas Hall  
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